United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1613

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

FEMINA MONTEZ, et al.,

Appellants,

-against-

GEORGE K. WYMAN, et al.,

Appellees.

- x

Docket 74 - 1613

APPELLANTS' BRIEF

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The decision below was rendered by Dudley Bonsal, D.J., S.D. N.Y.

QUESTIONS PRESENTED

1. Does the Eleventh Amendment Immunity extend to cities and other political subdivisions of the state?

2. Does the Eleventh Amendment bar suits against individuals acting under color of state law?

3. Did the District Court abuse its discretion in dismissing this action before trial?

STATEMENT OF THE CASE

This appeal is taken from the dismissal of an action for injunctive relief, a declaratory judgment, and damages. At the time the action was filed, the plaintiffs had been terminated from the assistance rolls of the defendant City of New York on the ground that a step-father living in the household was presumably financial able to and presumably was contributing to the support of the plaintiffs. Shortly after the action was commenced, the defendant City of New York restored the plaintiffs to the public assistance rolls, and their application for a preliminary and permanent injunction was ruled to be moot. Thereafter, the plaintiffs' motion for summary judgment was denied. While the case was pending trial, the defendant George K. Wyman, Commissioner of Social Services for the State of New York, moved to dismiss the action on the ground of immunity under the Eleventh Amendment. This motion was granted by Judge Bonsal on May 7, 1973. Thereafter, during pre-trial conference, the defendant Jack R. Goldberg, Commissioner of the Department of Social Services of the City of New York, also moved to dismiss on the ground of immunity under the Eleventh Amendment. This motion was also granted by Judge Bonsal. This appeal follows.

The plaintiffs are a mother and two children, recipients of public assistance under the Federal Aid to Families with Dependent Children (hereafter AFDC) program, 42 U.S.C. §§601ff. The father of the infant plaintiffs abandoned the family and his whereabouts are unknown. He contributes nothing to the support of the family. In January, 1969, Fermina Montez re-married to Luis Perdomo. The defendants conclusively presumed from the mere fact of the marriage between these two persons that Luis Perdomo would completely support both his new wife and his two infant step-children, and completely terminated assistance. In fact, Luis Perdomo has consistently been both unable and unwilling to contribute to the support of these two children, who are not his own.

After this action was commenced, the plaintiffs were restored to public assistance. The issue remaining for trial is whether the plaintiffs are entitled to recover retroactive benefits for the period of time that their assistance was either reduced or terminated by the defendants pursuant to an unlawful statute and regulations. Judge Bonsal ruled that the awarding of retroactive benefits was discretionary, and dismissed the action.

POINT I. THE ELEVENTH AMENDMENT DOES NOT EXTEND TO THE DEFENDANT GOLDBERG IN THIS CASE.

The Supreme Court has consistently adhered to the rule of decision that the State's Eleventh Amendment immunity does not extend to its political subdivisions. Lincoln County v. Luning, 133 U.S. 529 (1889). As the Court recently pointed out in Edelman v. Jordan, ____ U.S. ____ 42 U.S. L.W. 4419, 4424 (3/25/74), fn. 12:

> The fact that the county policies executed by the county officials in Griffin were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment.

See also Moor v. County of Alameda, 411 U.S. 693 (1973); Cooper v. Westchester County, 42 F. Supp. 1 (S.D.N.Y. 1941); Graham v. Folsolm, 200 U.S. 248 (1905); Universal Surety Co. v. Lescher & Mahoney, 340 F. Supp. 303 (D. Ariz. 1972); Brown v. Marshall County, Kentucky, 394 F. 2d 498 (6th Cir. 1968) at page 500.

The method of analysis in these cases involves an examination of the relation between the State and its

political subdivision, in order to determine whether the State has created an independent entity, capable of existing on its own, and of meeting its obligations and settling claims against it. This analysis clearly compels the conclusion that the City of New York and its officials are not within the State's Eleventh Amendment immunity. Article 9 of the New York Constitution deals with Local Governments. Local governments can enter into direct contracts with the Federal government (N.Y. Const. Art. IX, §9(1)(c)). They have full control over their employees and their actions (§9(2)(c)(1)). They have full control over the presentation and discharge of claims against them (§9(2)(c)(5). See also the New York Municipal Home Rule Law, §10. The result of this analysis clearly negates any claim of Eleventh Amendment immunity for the remaining defendant, in view of the policy enunciated above for cases of this kind, and in view of the Supreme Court's stated philosophy of confining the immunity in general. See Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).

The Court of Appeals for the Ninth Circuit has held that the Eleventh Amendment does not confer immunity upon municipal corporations. Long Beach v. Metcalf, 103 F. 2d 483 (9th Cir. 1939).

Further, in this case there is no showing that

the State will in any way be directly affected by this suit. It has been established as a matter of Federal law since before the enactment of the Fourteenth Amendment that the result of any subsequent or ancillary proceeding, the outcome of which may in the future affect the State treasury, is irrelevant to a pending case in Federal court. Missouri, Kansas & Texas Ry. Co. v. Hickman, 183 U.S. 53, 22 S. Ct. 18 (1901). In that case, the court went on to hold that:

> Neither can it be held that the state's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commission makes it the real party plaintiff. That is simply an incidental matter... 22 S. Ct. at page 21.

Further, this quasi-agency theory goes against the state statute and state case law. The New York State Social Welfare Law §62(1) provides:

> Subject to reimbursement in the cases hereinafter provided for, each public welfare district* shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.

Thus, the primary liability is upon the City, subject

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*New York City is a public welfare district. New York Social Welfare Law, §56.

to later State reimbursement in appropriate cases. Prospective refusal of State reimbursement does not excuse the City's present obligation to the recipient. Lawson v. Shuart, 323 N.Y.S.2d 488 (Sup. Ct. Nas. Cty., 1971) at page 490; see Young v. Shuart, 325 N.Y.S. 2d 113 (Sup. Ct. Nas. Cty. 1971) aff'd 331 N.Y.S. 2d 962 (App. Div. 2d Dept. 1972); Preston v. Barbaro, 305 N.Y.S. 2d 627 (Sup. Ct. Nas. Cty. 1969) aff'd 311 N.Y.S. 2d 997 (2d Dept. 1970).

There is no basis for extending the State's limited Eleventh Amendment immunity to the defendant in this case.

POINT II. THIS COURT HAS EQUITABLE POWER TO AWARD RETROACTIVE BENEFITS TO THE PLAINTIFFS.

Once this court assumes jurisdiction over this action, the question of the remedies to be awarded must be resolved. This issue is in turn composed of two aspects:

A. Is this court prohibited from awarding any particular kind of relief in this case?

B. Is the award of the relief requested equitable under all of the circumstances?

First, it should be kept in mind that the monetary relief sought is restricted to the amount properly due the plaintiffs under Federal law. There is no claim for damages suffered by reason of missed checks or reduced checks, as, for example, the costs of defending a non-payment of rent case because the defendant did not grant sufficient funds for housing. Nor is there a claim based on pain and suffering.

There has been a tendency to say that the relief requested in this case is for damages, because a monetary award is sought. However, it is far from clear that that label is the correct one in this case. In the first place, many, if not all, of the cases against State officials result in monetary expenditures

from the State treasury, whether from complying with an injunction or merely from the costs of defending the suit. However, it is clear that this is no bar to the exercise of a Federal Court's traditional equity power to shape the remedy so as to vindicate the rights invaded. Brown v. Board of Education, 349 U.S. 294 (1955), at page 300. See Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). See in general Bell v. Hood, 327 U.S. 678 (1946), at page 684. The principle is well stated in Sterling v. Constantin, 287 U.S. 378 (1932):

> If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the relief found to be appropriate according to the circumstances of the case. Id., at page 403.

Apparently recognizing this principle, this court, in deciding Rothstein v. Wyman, 467 F. 2d 226 (2d Cir. 1972), devoted a major portion of its opinion to a discussion of the factors which affected the equitable exercise of the court's power in enforcing Federal rights and in maintaining state-federal comity. It found that, under the circumstances of that case, it would be inequitable to grant retroactive relief. This is a matter which in this case should be decided after trial.

Another approach to the problem of retroactive benefits was adopted in Alexander v. Weaver, 345 F. Supp. 666 (N.D. Ill. 1972) (three-judge court). In that case, the court defined the issue as concerning the propriety and equitableness of giving its decision retrospective effect by awarding retroactive benefits. After a detailed discussion of the authorities, both civil and criminal, the court adopted the standard set out in Linkletter v. Walker, 381 U.S. 618 (1965), that retroactive application should be given or withheld based upon the history of the rule, its purpose and effect, and whether retrospective operation would further or retard its operation. Alexander v. Weaver, supra, at page 670.

In the case at bar, the retroactive award is sought only for the individual plaintiffs. No class relief is pending. Plaintiffs believe that the record shows a history of a lack of good faith on the part of State and City welfare officials, and great hardship to the plaintiffs. The history of step-parent regulations across the country has been, like the residency requirements, almost universal judicial disapproval. If the officials here are permitted to retain the monies wrongfully withheld from the plaintiffs, there is no effective sanction or detriment

to curb unlawful or unconstitutional conduct. The State and City have lost nothing, and have in fact gained by delay in complying with Federal law.

The award of retroactive benefits is lawful and proper under the exercise of this court's equitable powers, as will appear more fully upon the trial of this action.

POINT III. IN CIVIL RIGHTS CASES, THE ELEVENTH AMENDMENT BARS ONLY ACTIONS AGAINST THE STATE AS AN ENTITY.

A clear statement of the rule is found in Pennoyer v. McConnaughy, 140 U.S. 1 (1891), where the court differentiated two types of cases involving state officials:

> The first class is where the suit is brought against the officers of the States, as representatives of the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. (citations omitted.) The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff... Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong or injury...is not within the meaning of the Eleventh Amendment an action against the State." Id, at p. 10.

Ex Parte Young, 209 U.S. 123 (1908), is considered the landmark decision in this area. It is important to remember what was and was not involved in that case. There was no claim for damages, nor was the re-

covery of any funds, rate rebates, or other monetary remedy requested. The court enunciated the rule which had been evolving at least since the Civil War, and more probably since the enactment of the Eleventh Amendment:

> The (rule)... is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States *** (citation omitted.) 28 S.Ct. at p. 454.

See also Sterling v. Constantin, 287 U.S. 378 (1932).

This line of reasoning has been followed by the Supreme Court in recent years. In Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court held, in connection

with a federal action to enjoin a state criminal prosecution:

> The legislative history makes evident that Congress clearly conceived that it was altering the relationships between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. Id. at p. 242.

And in enforcing Federal rights in the voting area, the Supreme Court recently held:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." Gomillion v. Lightfoot, 364 U.S. 339 (1960) at page 347.

To the same effect, see State of South Carolina v. Katzenbach, 383 U.S. 301 (1966).

The policy effect of this rationale is clear and should be recognized as most applicable to the supervision of the Federal-State categorical assistance program. During and after the Civil War, the Southern States have differed with the Federal philosophy on the treatment of negroes. This disagreement has been open and official. States have enacted and enforced many

statutes which violate either Federal laws or the Federal Constitution. A state official who is directed to enforce a state statute or regulation, and who perceives a possible conflict between state law and the federal laws or Constitution, should take the trouble to ascertain whether the state law is valid. If he has doubts, he should decline to enforce it. If he goes ahead and enforces it with full knowledge that the Federal laws or Constitution may make the state law void, he must accept responsibility for the results. Poindexter v. Greenhow, 114 U.S. 270 (1885). In the case at bar, the practice of conclusively assuming income to a welfare recipient, regardless of the actual facts, has long been the subject of judicial attack and of federal regulation by the Department of Health, Education, and Welfare. King v. Smith, 392 U.S. 309 (1968); Lewis v. Martin, 397 U.S. 552 (1970); 42 U.S.C. §607; 45 C.F.R. §§233.10, 233.20(a)(3)(ii), 233.90. It seems clear beyond re-statement to this court that the New York step-parent regulation violates controlling federal law. It has been struck down by a federal court and a state court since the instant action was filed four years ago. Freda v. Lavine, ____ F. Supp. ____ (E.D. N.Y. 1973) 73-C-362, Judd, J., July 3, 1973; Slochowsky v. Lavine, 342 N.Y.S. 2d 525 (Sup. Ct. Nassau Cty. 1973).

Its validity was always seriously in doubt under the terms of the federal regulations and in view of the myriad decisions in other states with similar regulations. See, eg., Rosen v. Hursch, 464 F. 2d 731 (8th Cir. 1972); Lewis v. Stark, 312 F. Supp. 197 (N.D. Cal. 1968); Ojeda v. Hacknew, 319 F. Supp. 149 (N.D. Tex. 1970); In the Matter of the Continuance of Grants to the State of California, Decision of Hearing Examiner, Oct. 6, 1970, pp. 10-11. In this respect, State and City officials who avert their eyes from the rule of law and delay compliance as long as possible, knowing that they are violating controlling federal law, are no more excused in their actions than the State governor who defies a Federal order to desegregate. Federal courts exist to enforce Federal rights. And the Supreme Court has since its inception accepted this duty willingly and ably. To carve out an exception in the public benefits field would be an anomoly.

Edelman v. Jordan, supra, although severely narrowing remedies against the state, did not disturb the reasoning behind the many earlier cases, for one crucial reason: in both Edelman and Rothstein v. Wyman, the amount of money was to be paid to a large class, with the result that each decision would have cost millions of dollars, sums which by no stretch of the imagination

could have been paid the individuals sued. In the case at bar, the relief goes only to the individual plaintiffs, and amounts to approximately one thousand dollars. This cost should and can be borne by the individuals. If they are later reimbursed voluntarily by the state in its discretion, that is of no concern to the Federal courts. See discussion in Point I, supra.

Three cases, Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944), Ford Motor Co. v. Department of Treasury of the State of Indiana, 323 U.S. 459 (1945), and Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946), have been cited in support of a less expansive concept of federal jurisdiction over civil rights claims. All of these cases involve actions by out-of-state corporations to recover state taxes already paid. In each case, the remedy asserted was one created by state statute expressly for tax cases. All were decided between 1944 and 1946 by closely divided courts.* However, each involved distinctive

*Justice Frankfurter dissented from all three holdings, framing the philosophical issue as follows:

> "Though this (Eleventh Amendment) immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the state." Kennecott Copper Corp. v. State Tax Commission, supra, at page 580.

facts, and each must be considered separately.

Great Northern Life Insurance Co. v. Read, supra, was brought to Federal courts on the ground of diversity of citizenship. The plaintiffs followed the procedures outlined in the State statute and named State officials specified in that statute in their official capacities. The Supreme Court held that the plaintiffs had elected to use this remedy, and stated:

> In our view of this case it is unnecessary for us to pass upon whether this (statutory remedy) method of protecting taxpayers was intended to be exclusive of all other remedies, including action against an individual who happened to be a tax collector, or whether if it were not so intended it would surmount all constitutional objection. (citations omitted) Id., at pp. 51-52.

Thus, the Supreme Court expressly narrowed the issue to a consideration of whether the individuals were sued in their official capacity, and explicity upheld the rationale of the line of cases typified by Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280 (1912), which have upheld the right to sue a state tax collector individually to recover taxes collected pursuant to an unconstitutional statute. In that case, Justice Holmes, speaking for the majority, said:

> If he had no right, as he had not, to collect the money, his doing so in the name of the state cannot protect him. Id., at p. 281

In Ford Motor Co. v. Department of Treasury of the State of Indiana, the basis for federal jurisdiction is less clear, although there clearly was diversity jurisdiction, and the court indicated that that was the basis of jurisdiction. (Id. at pp. 463-64). In any event, the court again found it crucial that the defendants were named in their official capacities, and that the suit was framed in terms of the remedy created by the state statute. The court drew the rule of decision as follows:

> Where relief is sought under general law for wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. (citations omitted) Where, however, an action is authorized by statute against a state officer in his official capacity and constituting an action against the state,the Eleventh Amendment operates to bar suit except insofar as the statute waives state immunity from suit. (citations omitted) Id., at p. 462.

Kennecott Copper Corp. v. State Tax Commission, supra, was brought against the State tax commission and against certain individuals constituting the commission

as members, again all as set forth in the State statute. However, jurisdiction in this case was explicitly alleged to rest either on diversity or Federal question (although not upon a Civil Rights claim: the tax was said to interfere with a Federal wartime excess profits statutes). Without changing its rule of decision, the court again denied Federal jurisdiction:

> As the suits were against the Commission and the members as 'constituting' such Commission, were based upon the payment to the Commission as collector for Utah and sought recovery of the fund, sequestered by (the state statute)...we are satisfied these suits were against Utah."

In conclusion then, the holding of the three tax cases is actually quite narrow: in non-Civil Rights cases, a suit against a state officer in his official capacity only, pursuant to a remedy created by state statute, is barred, at least where the funds collected have passed from his possession into the State treasury. Any broader rationale would bring these cases into conflict with the earlier tax collection cases, and by fair implication, with the many rate cases, eg., Missouri, Kansas, & Texas Ry. Co. v. Hickman, 183 U.S. 53 (1901), well known to the Supreme Court and explicitly recognized as valid in these three decisions.

The conclusion to be drawn from the cases is

that the Congressional intent, the clear meaning of the statute and the Constitutional Amendments, and the history of judicial determination all compel the conclusion that in Civil Rights cases under the Fourteenth Amendment Federal jurisdiction is broad and sweeping and extends to all actions against state officials and any individual acting under color of State law. The Eleventh Amendment applies only in its narrow, literal sense to confer a limited immunity upon the State as an entity. Edelman v. Jordan, supra, does not alter this rule unless the scope of the relief and the massive cost thereof make it obvious that any payments must come from the State.

CONCLUSION

The Order of the District Court dismissing this action should be reversed and the matter set for trial.

Dated: June 17, 1974

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FERMINA MONTEZ, et al., Appellants, -against- GEORGE K. WYMAN, et al., Appellees.	AFFIDAVIT OF SERVICE BY MAIL Index No. 73-1613

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAURA VILLAFANE, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 316 West 94th St., NYC 10025.

That on the 17th day of June, 1974, deponent served the within Appellants' Brief (two copies each)

upon Norman Redlich, Corporation Counsel, Municipal Bldg, NYC, Attorney for Defendant Goldberg; and Louis J. Lefkowitz, Attorney General, 80 Centre Street, New York City, attorney for Defendant Wyman,
the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Laura Villafane
LAURA VILLAFANE

Sworn to before me this
17th day of June, 1974.

Angelina Mitchell

ANGELINA MITCHELL
Notary Public, State of New York
No. 31-2731255
Qualified in New York County
Commission Expires March 30, 1975